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No. 07-1524

In The
Supreme Court of the United States

CARLOTA COPPER COMPANY,
Petitioner,

v.

FRIENDS OF PINTO CREEK, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE ARIZONA MINING ASSOCIATION, COLORADO MINING ASSOCIATION, NEW MEXICO MINING ASSOCIATION, AND NEVADA MINING ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

KENNETH VON SCHAUMBURG
Counsel of Record
GALLAGHER & KENNEDY, P.A.
1101 PENNSYLVANIA AVENUE
6TH FLOOR
WASHINGTON, D.C. 20004
(202) 756-4392

D. LEE DECKER
RHETT B. LARSON
GALLAGHER & KENNEDY, P.A.
2575 EAST CAMELBACK ROAD
PHOENIX, AZ 85016-9225
(602) 530-8500

Counsel for Amici Curiae

July, 2008

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

1. Whether – contrary to this Court's holdings and relevant holdings of state courts of last resort – the Ninth Circuit erred in holding that the federal Clean Water Act ("CWA") (33 U.S.C. § 1251 *et seq.*) prohibits the U.S. Environmental Protection Agency ("EPA") and states implementing the CWA from issuing permits for discharges to "impaired" waters where the agency conditions that permit on offsets having the net effect of improving water quality.

2. Whether - contrary to this Court's holdings and relevant holdings of state courts of last resort – the Ninth Circuit failed to properly defer to EPA's consistent and long-standing interpretation of the CWA and its own regulation (40 C.F.R. § 122.4(i)) promoting a policy of encouraging offsets to improve water quality.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 7

REASONS FOR GRANTING CERTIORARI 9

I. THE COURT SHOULD GRANT CERTIORARI TO ENSURE CONSISTENCY WITH CURRENT SUPREME COURT PRECEDENT INTERPRETING THE CWA 10

II. THE COURT SHOULD GRANT CERTIORARI TO ENSURE THAT FEDERAL COURTS INTERPRET THE CWA AND ITS REGULATIONS CONSISTENT WITH STATE SUPREME COURT DECISIONS 16

III. THE COURT SHOULD GRANT CERTIORARI TO ENCOURAGE DEFERENCE TO EPA INTERPRETATIONS AND POLICIES WHICH HAVE THE NET AFFECT OF IMPROVING WATER QUALITY IN IMPAIRED WATERS . 19

CONCLUSION 26

TABLE OF AUTHORITIES

CASES

Arkansas v. Oklahoma,
503 U.S. 91 (1992) ..... *passim*

Auer v. Robbins,
519 U.S. 452 (1997) 22

Baltimore Gas & Elec. Co. v. NRDC,
462 U.S. 87 (1983) 8, 22

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,
467 U.S. 837 (1984) 8, 9, 20, 22

Crutchfield v. State Water Control Board,
612 S.E.2d 249 (2005) 8, 9, 18

Friends of Pinto Creek v. U.S. EPA,
504 F.3d 1007 (9th Cir. 2007) ..... *passim*

Household Credit Servs. v. Pfennig,
541 U.S. 232 (2004) 20

In re Cities of Annandale,
731 N.W.2d 502 (Minn. 2007) ... 8, 9, 16, 17, 18

INS v. National Center for Immigrants' Rights,
502 U.S. 183 (1991) 23

King v. St. Vincent's Hops.,
502 U.S. 215 (1991) 17

Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29 (1983) 21, 22

Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989) 22

Robinson v. Shell Oil Co., 519 U.S. 337 (1997) 19

Thomas Jefferson Univ. v. Shalala, 512 U.S. 504 (1994) 8

United States v. Ron Pair Enterprises, Inc., 489 U.S. 235 (1989) 19

STATUTES

33 U.S.C. § 1251(a) 3, 4, 10

33 U.S.C. § 1313(d) 5, 14

33 U.S.C. § 1342(a)(2) 19

33 U.S.C. § 1342(b) 4

33 U.S.C. § 1362(12) 15

42 U.S.C. § 7503(c) (2008) 24

RULES

Sup. Ct. R. 10(a) 8, 16

Sup. Ct. R. 37.2 1

Sup. Ct. R. 37.6 1

REGULATIONS

40 C.F.R. § 122.2 ..... 6, 15

40 C.F.R. § 122.4(i) ..... *passim*

OTHER AUTHORITIES

41 Fed. Reg. 55524 (December 1976) 24

America's Climate Security Act of 2007, S. 1291, 110th Cong. §§ 2401-2411 (2007) 24

Arizona Department of Environmental Quality, "Pinto Creek Site-Specific Water Quality Standard for Dissolved Copper," Water Quality Division, Phoenix, AZ (March 12, 2007) 23

Breetz, Hanna, Karen Fisher-Vanden, Laura Garzon, Hannah Jacobs, Kailin Kroetz, Rebecca Terry, "Water Quality Trading and Offset Initiatives in the US: A Comprehensive Study," Dartmouth College, Hanover, NH (August 5, 2004) 26

Leaming, George F., "The Economic Impact of the Arizona Copper Industry 2007," Western Economic Analysis Center, June 2008 2

U.S. EPA, "EPA Estimates Costs of Clean Water TMDL Program," Press Release, Washington D.C. (August 3, 2001) 5

U.S. EPA, "TMDL Development Cost Estimates: Case Studies of 14 TMDLs," Office of Water, Washington, D.C. (May 1996) 14

U.S. EPA, "Water Quality Trading Policy," Office of Water, Washington, D.C. (January 13, 2003) 6, 25

STATEMENT OF INTEREST OF AMICI CURIAE[1]

The Arizona Mining Association, Colorado Mining Association, New Mexico Mining Association, and Nevada Mining Association (collectively, the "Amici") are non-profit business leagues. The Amici acquire and disseminate scientific and business information essential to sound public policies affecting the mining industry throughout the Southwestern United States. Importantly, the Amici associations have operations within the jurisdiction of the Ninth Circuit.

Amici members produce products essential to modern life and public infrastructure, forming integral components in such varied areas as mass transit systems, national defense, information technology and communication systems, energy, medical devices and homes.

This case poses significant legal, practical and economic issues for the mining industry in the regions in which members of the Amici conduct business. The Ninth Circuit's decision in this case threatens the vitality of this essential industry and the jobs of the

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[1] Pursuant to this Court's Rule 37.2(a), the Amici states that counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae*'s intention to file this brief. Pursuant to Rule 37.6, the Amici further note that no counsel for a party authored this brief in whole or in part, and no counsel made a monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief; copies of the consent letters have been filed with the Clerk.

families which depend on its continued contribution to the prosperity of the Nation.

The mining industry in Arizona directly employs more than 10,300 people, and indirectly generates over 30,000 additional jobs in related support industries in 2007. The direct impact to the state's economy from the mining industry amounted to $3.2 billion in 2007, with the combined direct and indirect impact exceeding $6.8 billion, not to mention over $138 million in state and local taxes.[2]

The mining industry in Colorado directly employs more than 5,000 people, and generates more than 5,000 additional jobs in related sectors. Colorado mining companies paid more than $320 million in taxes in 2006 alone, and generated nearly $2 billion in direct impact to the state's economy in that same year.[3]

In New Mexico, the mining industry provided a direct economic impact to the state of over $1.5 billion in 2005 (with the combined direct and indirect gain for the state being over $3 billion), and the mining industry paid over $200 million in total taxes in that same year.[4] The mining industry in New Mexico

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[2] *See* Leaming, George F., "The Economic Impact of the Arizona Copper Industry 2007," Western Economic Analysis Center, June 2008.

[3] http://www.coloradomining.org/mc_miningfacts.php

[4] http://minerals.usgs.gov/minerals/pubs/state/2005/myb2-2005-nm.pdf

employed over 6,000 people directly in 2005, and with a combined direct/indirect employment of over 12,000 people.[5]

The mining industry in Nevada generated over 12,000 mining jobs in 2005 alone, with a total of nearly 32,000 considering related industries supporting the mining industry. The Nevada mining industry generated over $345 million in economic gains to the state in 2005 alone.[6]

In total, the mining industries represented by the Amici directly employ over 33,000 people, and directly and indirectly generate jobs for over 91,000 people. This industry generates over $6 billion in economic gains to their respective states, with the related payments of well over $600 million in taxes in a single year.

This case raises important issues as to the ultimate purpose of the federal Clean Water Act ("CWA" or the "Act") (33 U.S.C. § 1251 *et seq.*), how federal and state agencies go about achieving those purposes, and the role of courts in reviewing interpretations and actions taken by those agencies under the CWA. Amici have keen interests in its ultimate disposition, because Amici association members undertake activities that discharge to "waters of the United States" requiring approvals under the CWA from the U.S. Environmental Protection Agency ("EPA") and state

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[5] http://www.nma.org/pdf/states_04/nm2004.pdf

[6] http://www.nma.org/pdf/states_04/nv2004.pdf

agencies administering the CWA in pursuant to a grant of primacy by EPA under CWA Section 402(b). 33 U.S.C. § 1342(b). Amici's interests in this case arise from three concerns.

First, the Ninth Circuit's decision in *Friends of Pinto Creek v. U.S. EPA*, 504 F.3d 1007 (9th Cir. 2007) undermines the express purpose of the CWA – to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The Ninth Circuit's holding potentially forecloses to AMA members (as well as federal and state environmental agencies implementing the CWA in the Ninth Circuit) the ability to condition the permitting of important mining projects that may discharge to impaired waters on the performance of offset projects that will result in a net improvement to water quality. AMA members frequently engage in remediation efforts both to facilitate permitting under the CWA and to accomplish the purposes of the CWA. Such remediation/offset conditions constitute an important, cost-effective and long-relied upon option for improving and maintaining water quality.

Second, the Ninth Circuit's decision creates a precedent that could result in future federal court decisions that (i) fail to properly consider relevant state supreme court decisions upon which Amici members rely; and (ii) fail to properly defer to agency interpretations which Amici members must have confidence will be deferred to by courts because of an agency's regional and technical expertise. Amici have a profound interest in ensuring that relevant state supreme court decisions be given proper weight in federal courts to promote respect for principles of

federalism and state sovereignty. Furthermore, Amici have an acute interest in judicial deference to administrative actions taken after the expenditure of significant time and resources (both by the agency and the permittee), and implemented by regional experts best positioned to make the highly technical determinations characteristic of CWA permitting.

Third, the Ninth Circuit's failure to defer to EPA's interpretation of the CWA and its own regulations could impose significant costs on Amici associations' members. The Ninth Circuit's holding appears to require that states administering the CWA make demonstrations of sufficient remaining pollutant load allocations in receiving waterbodies beyond the formulation of "total maximum daily loads" ("TMDLs") under 33 U.S.C. § 1313(d). *Friends of Pinto Creek*, 504 F.3d at 1012. The formulation of a TMDL is an already costly and time-consuming process, which delays mining projects and requires extensive participation from the mining industry. In 2001, the cost of formulating a TMDL averaged $52,000 per listing and, the TMDL program in total costs the Nation between $900 million and $4 billion annually.[7] Imposing unspecified additional judicially-crafted demonstrations, not required by the CWA, would divert scarce resources from more important water quality protection measures, and would delay, or even forestall, important mining projects critical to state and local projects and to the state and local economies, because these mining projects depend on CWA

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[7] U.S. EPA, "EPA Estimates Costs of Clean Water TMDL Program," Press Release, Washington D.C. (August 3, 2001).

permits. Of course, the mining industry would not be alone in facing the tremendous practical and financial implications of this case. Virtually every federal, state or municipal project or infrastructure (e.g., roads, bridges, wastewater treatment plants, storm sewers) depends on CWA permitting, and many (if not most) industries and private construction projects require CWA permitting in order to proceed expeditiously and responsibly.

If CWA permits for discharges to impaired waters (which make up more than 45% of the Nation's waters)[8] are precluded or forestalled by additional, costly requirements, the Ninth Circuit's decision could have a paralyzing effect on all of these important projects, and eliminate the option to allow those projects to proceed subject to offsetting their discharges through remediation activities. The Ninth Circuit's decision also suggests that agencies and CWA permittees would have to somehow implement compliance schedules on all dischargers, including dischargers not subject to the CWA (i.e., non-point source dischargers). *Friends of Pinto Creek*, 504 F.3d at 1012-1013. Such an undertaking would prove impractical (and nearly impossible in many instances), and would be contrary to CWA requirements, which expressly require compliance schedules only for permitted discharges. *See* 40 C.F.R. § 122.2.

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[8] U.S. EPA, "Water Quality Trading Policy," Office of Water, Washington, D.C. (January 13, 2003), pp. 1.

SUMMARY OF ARGUMENT

Amici curiae Arizona Mining Association, Colorado Mining Association, Nevada Mining Association, and New Mexico Mining Association (collectively "Amici") endorse the Petitioners' reasons for granting certiorari, *i.e.*, that the Ninth Circuit's decision conflicts with decisions of this Court and with relevant state supreme court decisions, and that the Ninth Circuit failed to properly defer to EPA's interpretation of the CWA and its own regulations. Amici submit this *amici* brief to underscore three important points which favor the Court granting *certiorari*:

First, the Ninth Circuit's decision deviates sharply from the plain language of the CWA as interpreted by this Court in *Arkansas v. Oklahoma*, 503 U.S. 91 (1992). The Ninth Circuit failed to apply this Court's interpretation of the CWA, and thereby failed to give effect to the clear legislative intent and express purposes of the Act. The Ninth Circuit's decision would therefore eliminate essential flexibility built into the Act by Congress, and upheld by this Court, which allow EPA and states to improve water quality while at the same time conserving agency resources and facilitating the permitting of important projects. Furthermore, the Ninth Circuit's overly-expansive interpretation of CWA permitting requirements, and disregard for the broad authority granted to EPA in the CWA, effectively creates the categorical ban on discharges to impaired waters rejected by this Court in *Arkansas*, because the Ninth Circuit's holding will impose baseless and impractical conditions on discharges to impaired waters, even where those

discharges have the net effect of improving water quality.

Second, the Ninth Circuit's decision fails to take into consideration relevant state supreme court decisions, thus favoring Petitioner's writ under Supreme Court Rule 10(a). The Minnesota Supreme Court held, under facts strikingly similar to those at issue here, that the CWA accords "flexibility and broad authority" to permit discharges to impaired waters where those discharges are offset by permit conditions requiring remediation. *In re Cities of Annandale, et al.*, 731 N.W.2d 502 (Minn. 2007). Additionally, the Virginia Court of Appeals, interpreting a regulation virtually identical to the one at issue here, held that the CWA and the regulation did not prohibit the implementation of permit conditions on discharges to impaired waters which would have the net effect of improving water quality. *Crutchfield v. State Water Control Board*, 612 S.E.2d 249 (2005).

Third, the Ninth Circuit's decision utterly ignores its obligation to accord proper deference to EPA's interpretation and implementation of the CWA and its expertise in permitting matters. See, e.g., *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984); *see also Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994); *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 103 (1983). Indeed, the Ninth Circuit did not even address the issue of deference in its decision.

REASONS FOR GRANTING CERTIORARI

The Ninth Circuit has brazenly forged a new path in statutory interpretation and the role of the judiciary in administrative matters. In so doing, the Ninth Circuit ignored this Court's decision in *Arkansas v. Oklahoma*, 503 U.S. 91 (1992), in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, 81 L.Ed.2d 694, 104 S.Ct. 2778 (1984), and at least two state court decisions addressing nearly identical issues. *See In re Cities of Annandale, et al.*, 731 N.W.2d 502 (Minn. 2007); *Crutchfield v. State Water Quality Control Board*, 612 S.E.2d 249 (Vir. 2005). Unfortunately, the Ninth Circuit's new path threatens the quality of the Nation's waters, impedes critical state, local, and industrial projects, and disregards long standing principles of *stare decisis* and judicial deference to relevant state supreme court decisions, reasonable administrative interpretations, and related agency actions. This Court should take this opportunity to guide the Ninth Circuit back to the clear path blazed by Congress in the CWA, reinforced by this Court's decisions, and reasonably and consistently implemented by EPA and the states.

The Court should therefore grant Petitioner's writ for *certiorari* to address three deficiencies in the Ninth Circuit's holding: (1) its failure to apply this Court's interpretation of the CWA; (2) its failure to consider relevant state supreme court precedent; and (3) its failure to defer to EPA's reasonable interpretation of the CWA and its regulations, as required by this Court's holdings.

I. THE COURT SHOULD GRANT CERTIORARI TO ENSURE CONSISTENCY WITH CURRENT SUPREME COURT PRECEDENT INTERPRETING THE CWA.

The overriding purpose of the CWA is to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). This Court has addressed this paramount goal in its own interpretation of the CWA in *Arkansas v. Oklahoma,* 503 U.S. 91 (1992). In *Arkansas*, the EPA issued a National Pollutant Discharge Elimination System ("NPDES") permit, similar to the one at issue here. The permit was for discharges that would reach a water not in compliance with surface water quality standards – an impaired water. The Tenth Circuit had invalidated that permit, holding that the CWA categorically prohibits discharges to such impaired waters. This Court, *however*, reversed on appeal, holding:

> The Court of Appeals construed the Clean Water Act to prohibit any discharge of effluent that would reach waters already in violation of existing water quality standards. We find nothing in the Act to support this reading. [¶] [R]ather than establishing the categorical ban announced by the Court of Appeals – which might frustrate the construction of new plants ***that would improve existing conditions*** – the Clean Water Act vests in the EPA and the States broad authority to develop long-range,

> areawide programs to alleviate and eliminate existing pollution.

503 U.S. at 107, 108 (emphasis added).

This Court therefore upheld EPA's interpretation of the CWA – that the preeminent concern of the Act is to improve water quality conditions, and that EPA and the States therefore have significant flexibility in permitting decisions to achieve that goal. Indeed, elsewhere in *Arkansas*, this Court made a more general statement with respect to this flexibility. This Court stated that "Congress has vested in the [EPA] Administrator broad discretion to establish conditions for NPDES permits." 503 U.S. at 105. The legislative intent of the CWA, according to this Court, was to provide maximum administrative flexibility in establishing NPDES permit conditions in order to achieve the primary purposes of the CWA – the restoration and maintenance of water quality. In this case, EPA conditioned Carlota Copper Company's ("Carlota") NPDES permit on Carlota's remediation of the historic Gibson Mine, a significant contributor of pollutants to Pinto Creek. EPA, acting in accordance with the flexibility granted it by Congress in the CWA and upheld by this Court, accomplished the primary goal of the Act by improving water quality in Pinto Creek through its broad authority to impose NPDES permit conditions, such as the offset/remediation condition at issue here.

The Ninth Circuit distinguishes *Arkansas* from the present case by noting that *Arkansas*, unlike the present case, addressed a categorical ban on discharges to impaired waters. *Friends of Pinto Creek*,

504 F.3d at 1013-1014. The Ninth Circuit, however, fails to take several issues into consideration in making this distinction.

First, this Court articulated in *Arkansas* the overriding principle of the CWA – to improve and maintain water quality. This principle is reinforced, according to this Court, by the "broad discretion" EPA and states have in conditioning permits. This Court did not limit its holding in *Arkansas* only to categorical bans on discharges to impaired waters, but instead stated that this flexibility applies to EPA and states specifically in establishing "conditions for NPDES permits" that "would improve existing conditions." This case poses an extremely similar factual scenario addressed by this Court in *Arkansas* – an agency using its broad CWA authority to condition NPDES permits for discharges to an impaired water to improve water quality. The Ninth Circuit's statements that permit conditions designed to improve water quality are irrelevant are therefore contrary to this Court's ruling in *Arkansas*.

The regulation the Ninth Circuit relies upon expressly provides for the type of flexibility built into the CWA and reinforced by this Court's ruling in *Arkansas*. The regulation states:

> No permit may be issued: (i) to a new source or new discharger if the discharge from its construction or operation ***will cause or contribute to the violation of water quality standards***. The owner or operator of a new source or new discharger proposing to discharge into a water segment which does not meet

> applicable water quality standards or is not expected to meet those standards... and for which the State or interstate agency has performed a pollutants load allocation for the pollutant to be discharged, must demonstrate, before the close of the public comment period, that: (1) there are sufficient remaining pollutant load allocations to allow for the discharge; and (2) the existing dischargers into that segment are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards.
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> 40 C.F.R. § 122.4(i) (emphasis added).

The prohibition in this regulation applies only to new discharges or new sources which "will cause or contribute to the violation of water quality standards." The regulation retains, therefore, the necessary flexibility to permit discharges which improve water quality, as is the case here, and as was the case in *Arkansas*.

Second, the Ninth Circuit fails to understand the implications of its holding. Its holding effectively amounts to the categorical ban on discharges to impaired waters struck down by this court in *Arkansas*.

The Ninth Circuit reads 40 C.F.R. § 122.4(i) to prohibit new discharges to impaired waters unless the permitting agency can demonstrate (i) sufficient remaining pollutant load allocations beyond the formulation of a TMDL; and (ii) that all existing dischargers, including unpermitted non-point source

dischargers not regulated under NPDES requirements, are subject to compliance schedules. *Friends of Pinto Creek*, 504 F.3d at 1012-1013. As to the Ninth Circuit's first condition – there is nothing in the CWA or its regulations suggesting that a TMDL is insufficient to demonstrate adequate remaining pollutant load allocations. Quite the contrary, a TMDL is the maximum amount of a pollutant a water body can receive and still achieve water quality standards. 33 U.S.C. § 1313(d). EPA and states administering the CWA spend significant time and resources developing a single TMDL as a precise means to achieving water quality standards and allocating pollutant loading limitations among NPDES permittees. By requiring an unspecified leap beyond the formulation of a TMDL, the Ninth Circuit places any permitting to impaired waters practically out of reach, even where permits would have the net effect of improving the water quality, because the demonstration of sufficient remaining pollutant load allocations beyond a TMDL would be prohibitively costly and time consuming.

For example, the Nevada Department of Environmental Protection ("NDEP") established a TMDL for a segment of the Truckee River. The establishment of this one TMDL for this one river segment took three years and cost the state $158,387.[9] The Ninth Circuit, with no statutory or regulatory basis, would require more time and more resources

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[9] U.S. EPA, "TMDL Development Cost Estimates: Case Studies of 14 TMDLs," Office of Water, Washington, D.C., (May 1996), pp. 111.

expended in demonstrating remaining pollutant load allocations in order to permit discharges which would improve water quality. The time and cost of meeting the Ninth Circuit's unspecified requirements beyond a TMDL amount to the categorical ban on discharges to impaired waters which this Court expressly rejected in *Arkansas*.

Additionally, the Ninth Circuit would require the permitting agency to subject all dischargers, even those not regulated under the NPDES program, to compliance schedules. *Friends of Pinto Creek*, 504 F.3d at 1012-1013. NPDES regulations apply only to point-source discharges. 33 U.S.C. § 1362(12). Nevertheless, the Ninth Circuit expects permitting agencies to subject non-point source dischargers to compliance schedules. This is a legal impossibility, because a "compliance schedule" is defined as "a schedule of remedial measures in a ***permit***." 40 C.F.R. § 122.2 (emphasis added). States cannot subject dischargers not subject to permitting requirements to compliance schedules when, by definition, a compliance schedule can only be imposed through a permit. As such, the Ninth Circuit's holding requiring compliance schedules for all dischargers to an impaired water effectively amounts to the categorical ban on discharges to impaired waters expressly rejected by this Court in *Arkansas*.

The Ninth Circuit's decision leaves its requirements for permitting discharges to impaired waters so amorphous, so costly, and so impractical that the court's interpretation transforms EPA's regulation from one expressly allowing for discharges which do not cause or contribute to exceedances of water quality

standards to a regulation which effectively bans all discharges to impaired waters, including beneficial discharges associated with offsets and remediation. The Ninth Circuit's effective ban on these beneficial discharges, and its abrogation of the critical statutory flexibility built into the CWA to allow for such discharges, is in direct contravention to the express legislative intent of the CWA and this Court's interpretation of that language in *Arkansas*. Under Supreme Court Rule 10(a), this Court may grant certiorari in cases where, as here, an appellate court has deviated from established Supreme Court precedent.

II. THE COURT SHOULD GRANT CERTIORARI TO ENSURE THAT FEDERAL COURTS INTERPRET THE CWA AND ITS REGULATIONS CONSISTENT WITH STATE SUPREME COURT DECISIONS.

Supreme Court Rule 10(a) establishes another important reason for this Court granting Petitioner's writ for certiorari, one which engenders respect for principles of federalism and promotes consistent application of the law in courts throughout the nation. The rule specifies one of the chief reasons for which this Court will grant certiorari is to settle an important federal question decided by a federal court that conflicts with a decision by a state court of last resort. The Ninth Circuit's decision failed to consider directly contradictory decisions by state courts of last resort.

In *In re Cities of Annandale, et al.*, 731 N.W.2d 502 (Minn. 2007), the Minnesota Supreme Court upheld a

NPDES permit for discharges to an impaired water against a challenge based on 40 C.F.R. § 122.4(i) because the discharge associated with the permit was offset by a reduction in pollutant loading to the river from a separate point source. The question at issue there is identical to the question here – whether an agency may consider offsets from another source in determining whether a discharge causes or contributes to the violation of water quality standards under 40 C.F.R. § 122.4(i). The Minnesota Supreme Court answered that question in the affirmative, relying on this Court's decision in *Arkansas*, including the bedrock principle that courts should defer to an agency's interpretation of its own regulation. *Annandale*, 731 N.W.2d at 512-513. *See also Arkansas*, 503 U.S. at 112. The Minnesota Supreme Court held that the agency is presumed to have the expertise necessary to decide technical matters within the scope of its authority. *Annandale* 731 N.W.2d at 512.

Furthermore, the Minnesota Supreme Court held that the phrase "cause or contribute to a violation of water quality standards" set forth in 40 C.F.R. § 122.4(i) must be read in the context of the facts of the case in determining its plain meaning. *Citing King v. St. Vincent's Hops.*, 502 U.S. 215, 221 (1991). When read in the context of the permit conditions requiring offsets to discharges, the Minnesota Supreme Court held that the discharges associated with the permit at issue did not cause or contribute to violations of water quality standards, and thus were not precluded or conditioned under 40 C.F.R. § 122.4(i). *Annandale*, 731 N.W.2d at 518-519.

The Ninth Circuit's decision failed to consider the Minnesota Supreme Court's holding in *Annandale*, despite the nearly identical facts and questions of law. This Court should therefore accept certiorari for this case under its Rule 10(a) to resolve the inconsistency between the Ninth Circuit's decision and the Minnesota Surpeme Court decision in *Annandale*. Such a decision would reflect this Court's dedication to principles of federalism and cooperation between the state and federal court systems.

The Ninth Circuit similarly failed to consider the holdings of the Virginia Court of Appeals, interpreting a regulation virtually identical to 40 C.F.R. § 122.4(i) to allow for implementation of permit conditions on discharges to impaired waters which would have the net effect of improving water quality. *Crutchfield v. State Water Control Board*, 612 S.E.2d 249 (2005).

Resolution on grounds similar to those in *Annandale* and *Crutchfield* would not only demonstrate this Court's respect for principles of federalism and regional expertise, but would reinforce the overarching principle of *stare decisis*, already flouted by the Ninth Circuit's disregard for this Court's opinions on the meaning of the CWA in *Arkansas* and on judicial deference to agency interpretations (discussed below).

III. THE COURT SHOULD GRANT CERTIORARI TO ENCOURAGE DEFERENCE TO EPA INTERPRETATIONS AND POLICIES WHICH HAVE THE NET AFFECT OF IMPROVING WATER QUALITY IN IMPAIRED WATERS.

This Court has consistently upheld the bedrock principle of deferring to an agency's interpretations of the statutes the agency administers and the regulations the agency promulgates and implements under that statute. The Ninth Circuit's decision is striking in its complete disregard for judicial deference to administrative interpretations.

When dealing with statutory construction, a court begins by "determining whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997), *citing United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240 (1989). The plain language of the statutory provision dealing with agency flexibility in administering NPDES permits is found under CWA Section 402(a), which provides that EPA "shall prescribe conditions [for NPDES permits]... to assure compliance with the requirements of [CWA Section 402(a)(1)] ***and such other requirements as [it] deems appropriate***." 33 U.S.C. § 1342(a)(2) (emphasis added). As such, the CWA plainly and unambiguously accords EPA and states significant discretion in promulgating any permit conditions deemed appropriate, so long as the permit meets the requirements of CWA Section 402(a)(1).

The permit at issue here complies with the requirements of CWA Section 402(a)(1). Indeed, Respondent made no attempt to challenge the permit on those grounds. In accordance with the plain language of CWA Section 402(a)(2), EPA had authority to prescribe appropriate permit conditions, including the conditions requiring remediation of the Gibson Mine for offset purposes. This court affirmed in *Arkansas* that the Act granted "broad discretion" to EPA in establishing permit conditions. *Arkansas*, 503 U.S. at 105. As such, the CWA allows, and even promotes, the precise types of permit conditions which EPA employed in this case to improve water quality.

The Ninth Circuit not only failed the initial step of relying on the plain and unambiguous statutory language of the CWA, but failed in the secondary steps of statutory interpretation prescribed by this Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837 (1984). When reviewing an agency's interpretation of a statute it administers under the *Chevron* analysis, a court engages in the following two-step inquiry: (1) if "Congress has directly spoken to the precise question at issue," then the courts and agency "must give effect to the unambiguously expressed intent of Congress," or (2) if Congress has "explicitly left a gap for the agency to fill," the agency's regulation is "given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute." *Household Credit Servs. v. Pfennig*, 541 U.S. 232, 239 (2004) (*quoting Chevron*, 467 U.S. at 842-844) (internal citations omitted).

As already discussed, under the first step of the *Chevron* analysis, Congress has spoken

unambiguously to EPA's authority to promulgate NPDES permit conditions however it deems appropriate under CWA Section 402(a)(2). However, even if Congress had left a gap to be filled in by the agency, that agency's action is given controlling weight under *Chevron* Step 2 unless the action is arbitrary, capricious or manifestly contrary to the statute. Importantly, this Court has held that an agency ruling is "arbitrary and capricious if the agency has... entirely failed to consider an important aspect of the problem." *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983).

The regulation at issue here is entirely consistent with the broad discretion Congress granted to EPA in promulgating NPDES permit conditions. As noted above, 40 C.F.R. § 122.4(i) expressly applies only to discharges which "cause or contribute" to violations of water quality standards. This language fills in any gaps left by Congress in the CWA by expressly excluding from discharge prohibitions those permits subject to conditions which result in a net improvement of water quality in the receiving water. EPA's exclusion of discharges resulting in a net improvement of water quality from application of 40 C.F.R. § 122.4(i) is entirely consistent with the CWA's purpose of restoring and maintaining water quality, and the Act's express grant of broad authority to establish NPDES permit conditions. The regulations are therefore not arbitrary and capricious, but rather a reaffirmation of the goals and flexible permitting approach established by the CWA. The Ninth Circuit therefore failed to properly defer to EPA's interpretation of the CWA and to give effect to EPA's

regulatory exclusion of permits subject to offset conditions from discharge prohibitions under 40 C.F.R. § 122.4(i), as required by this Court under *Chevron*. The Ninth Circuit also failed to identify how EPA's ruling upholding Carlota's permit failed to consider an important aspect of the problem, as required under *State Farm*. 463 U.S. at 43. As such, EPA's ruling, under this Court's own holdings, cannot be arbitrary and capricious.

In any event, the Ninth Circuit should have deferred to EPA's interpretation of its own regulations. This Court has consistently held that courts owe deference to an agency's interpretation of its own regulations so long as that interpretation is not "plainly erroneous or inconsistent with the regulation." *Arkansas*, 503 U.S. at 112. *See also Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989); *Auer v. Robbins*, 519 U.S. 452 (1997). This deference to agency regulatory interpretations is all the more critical in instances, such as this case, where the agency has made an interpretation that is highly technical and involves scientific matters within the agency's expertise. *Baltimore Gas & Elec. Co. v. Natural Resource Defense Council*, 462 U.S. 87, 103 (1983). The Ninth Circuit failed to defer, consistent with this Court's rulings, to EPA's interpretation that 40 C.F.R. § 122.4(i) does not apply to discharges associated with permits subject to offset conditions, because those discharges do not "cause or contribute" to violations of surface water quality standards.

EPA's interpretation reasonably limiting the scope of the regulation (i.e., it applies only to discharges which cause or contribute to violations of water quality

standards) is not plainly erroneous or inconsistent with the regulation. The application of the regulation under EPA's interpretation is based on contextual information relating to pollutant loading, and is thus a highly technical determination of how best to achieve the purpose of the CWA based on the agency's own scientific expertise. Moreover, questions of water quality are highly nuanced due to regional geology and localized conditions. For example, in this particular case, Pinto Creek (the impaired water at issue), has a naturally elevated concentration of copper, as determined by the Arizona Department of Environmental Quality.[10] As such, determinations of pollutant load allocations and water quality standards in that waterbody rely heavily on an agency's technical expertise and understanding of local conditions. It is precisely these types of issues relating to unique regional conditions that are best addressed by state agencies or regional offices of federal agencies more familiar with local waters and their natural backgrounds. The Ninth Circuit, therefore, should have deferred to EPA's regional officers out of respect for regional expertise and as an acknowledgment that local agencies are better equipped to make water quality determinations when based on reasonable interpretations of statutes and regulations.

Furthermore, this Court has stated that an agency's "reasonable, consistently held interpretation" is entitled to substantial deference. *INS v. National*

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[10] Arizona Department of Environmental Quality, "Pinto Creek Site-Specific Water Quality Standard for Dissolved Copper," Water Quality Division, Phoenix, AZ (March 12, 2007).

Center for Immigrants' Rights, 502 U.S. 183, 189-190 (1991). The EPA and states administering the CWA have consistently relied upon offsets as an integral part of improving water quality throughout the country.[11] Indeed, the EPA has based much of its water quality policy on the concept of offsets, which are synonymous with water quality trading – wherein one discharger decreases pollutant loading to offset another (just as Carlota offset its discharges by remediating the Gibson Mine). EPA has commented on this policy, stating:

> The purpose of this policy is to encourage states, interstate agencies and tribes to develop and implement water quality trading programs for nutrients, sediments and other pollutants ***where opportunities exist to achieve water quality improvements at reduced costs***. More specifically, the policy is intended to encourage voluntary trading programs that facilitate implementation of TMDLs, reduce the cost of compliance with CWA regulations, establish incentives for voluntary reductions and promote watershed-based initiatives. A

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[11] Offsets constitute a critical mechanism under our environmental laws to balance economic and environmental interests. *See, e.g.*, 41 Fed. Reg. 55524 (December 1976) (1976 EPA "interpretive ruling" endorsing the use of offsets to allow permitting of new air pollution sources in nonattaining areas under the Clean Air Act); Clean Air Act § 173(c), 42 U.S.C. § 7503(c) (2008) (allowing offsets under the Clean Air Act permit program); America's Climate Security Act of 2007, S. 1291, 110th Cong. §§ 2401-2411 (2007) (featuring offsets to address greenhouse gas emissions).

> number of states are in various stages of developing trading programs.

See U.S. EPA, "Water Quality Trading Policy," Office of Water, Washington, D.C. (January 13, 2003), pp. 2 (emphasis added).

As evidenced by this policy, EPA consistently encourages reliance on offsets as a reasonable interpretation of the CWA and its own regulations. This reasonable, consistent interpretation is the foundation for an integral tool in improving water quality while lowering compliance costs. The Ninth Circuit's decision here eliminates the incentive for states to implement, and permittees to accept, permit conditions requiring offsets in those waters bodies most in need of improvement – impaired waters – because its holding effectively prohibits such conditions absent the permitting agency making impossible demonstrations demanded by its erroneous reading of 40 C.F.R. § 122.4(i). That regulation, according to EPA's reasonable and consistently held interpretation, does not apply to discharges associated with offsets, because those discharges do not "cause or contribute" to violations of water quality standards, but rather result in improved water quality. The Ninth Circuit owed substantial deference to this interpretation. Its failure to honor this Court's holdings in support of such deference now threatens important public policy initiatives to improve water quality.

For example, the Cities of Reno and Sparks, and Washoe County in Nevada, as well as the NDEP have developed a trading program between the cities, the

county and several point source dischargers to the Truckee River, an impaired water flowing from Lake Tahoe to Pyramid Lake. This innovative program, initiated under EPA's policy, described above, encouraging offsets and trading programs, has resulted in improved water quality in the Truckee River.[12] The Ninth Circuit's failure to defer to reasonable, consistent agency interpretations of the CWA and its regulations could foreclose new dischargers from participating in this program, and similar programs throughout the country, and thereby eliminate a critical incentive for participation in water remediations in connection with permitting important public and private projects under the CWA.

CONCLUSION

For the reasons stated in the Petition and in this amicus brief, the Court should grant the writ of certiorari and, on review, reverse the decision of the United States Court of Appeals for the Ninth Circuit.

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[12] Breetz, Hanna, *et al.*, "Water Quality Trading and Offset Initiatives in the US: A Comprehensive Study," Dartmouth College, Hanover, NH (August 5, 2004), pp. 190.

Respectfully submitted,

KENNETH VON SCHAUMBURG
Counsel of Record
GALLAGHER & KENNEDY, P.A.
1101 PENNSYLVANIA AVE.,
6TH FLOOR
WASHINGTON, D.C. 20004
(202) 756-4392

D. LEE DECKER
RHETT B. LARSON
GALLAGHER & KENNEDY, P.A.
2575 EAST CAMELBACK ROAD
PHOENIX, ARIZONA 85016-9225
(602) 530-8500

Counsel for Amici Curiae